SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

1 THE CIRCLE, SUITE 2
SUSSEX COUNTY COURTHOUSE
GEORGETOWN, DE 19947

February 17, 2009

Marcellous Holbrook
SBI#
SCI
P.O. Box 500
Georgetown, DE 19947

RE: State of Delaware v. Marcellous Holbrook, Def. ID# 0610024386

DATE SUBMITTED: December 12, 2008

Dear Mr. Holbrook:

Pending before the Court is a motion for postconviction relief which defendant Marcellous Holbrook ("defendant") has filed pursuant to Superior Court Criminal Rule 61 ("R. 61"). This is my decision denying the motion.

After a two day trial, a jury convicted defendant of the charges of trafficking in cocaine in violation of 16 *Del. C.* § 4753A(a)(2)(a); possession with intent to deliver cocaine in violation of 16 *Del. C.* § 4751; two counts of possession of a deadly weapon by a person prohibited in violation of 11 *Del. C.* § 1448(a)(3); and possession of drug paraphernalia in violation of 16 *Del. C.* § 4771.

At the trial, the State of Delaware ("the State") produced the following evidence.

The United States Department of Justice Drug Enforcement Administration Task Force

("Task Force") investigated defendant and placed him under surveillance for approximately a month before his arrest. On October 25, 2006, members of the Task Force executed a search and seizure warrant on defendant's residence, located at 11845 Hickman Drive, Laurel, Sussex County, Delaware. Defendant identified the bedroom which the officers searched as being his bedroom. The officers initially did not locate any drugs. When one of the officers asked defendant about the location of the drugs, defendant told him where to find them in the bedroom. In defendant's bedroom, police located letters addressed to defendant; a bag of crack cocaine; pants that contained a blue glove with two bags of cocaine, defendant's identification card and a key to a vehicle; $918 in United States currency in nine separate bundles (each bundle consisted of $100 worth of currency) located in a suitcase; and three cell phones. One of the bags of crack cocaine weighed 3.3 grams (approximately 24 to 68 individual dosage units would come out of that amount); the crack cocaine in the other bag weighed 4.6 grams; and the powder cocaine weighed 15.5 grams (approximately 13 to 50 individual dosage units would come out of that powder cocaine). The total amount of the drugs' weight was 23.4 grams. The authorities did not locate any drug paraphernalia which would indicate that defendant was a user. The packaging of the drugs, the amount of the drugs, the packaging of the substantial amount of money, and the lack of drug paraphernalia show that defendant was dealing in drugs and not using drugs. The key found in the pants fit, and started, a vehicle defendant had been seen driving during the investigation. Although defendant said the key fit another vehicle, it fit the Geo Prism which was parked across the street from defendant's residence and which had been observed, during the investigation, parked outside defendant's residence. During a search of this vehicle, the authorities found a red backpack which contains two loaded handguns. Defendant stipulated he

was a person prohibited due to a prior criminal conviction.

Defendant testified to the following. Although defendant had stipulated that 11845 Hickman Drive, Laurel, Delaware, was the place where he received mail, he rarely stayed there during the pertinent time period. Instead, he stayed with a cousin in Dover, he stayed with numerous women (but could only remember the name of one), and he stayed at hotels with women whose names he could not remember and who paid for the hotel rooms. The bedroom where the drugs were located was not his; he did not tell the officers where to find the drugs; he earned the cash detailing vehicles; he had a lot of old keys lying around in the bedroom; he had told Detective Marzec that he did not know to what the key belonged, but he thought it went to an abandoned vehicle; although he had seen the Geo Prism parked across the street from his residence, he had no idea who owned the Geo Prism; the Geo Prism never had been parked at his residence; and the pants in which the key and his identification card were located were not his.

The jury accepted the State's evidence and rejected defendant's testimony. It found defendant guilty as charged.

Defendant was sentenced on July 27, 2007. He did not appeal the convictions or sentences.[1] The judgment of conviction was final for Rule 61 purposes on August 26, 2007. Super. Ct. Crim. R. 61(m).[2]

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[1]This Court specifically questioned defendant as to whether he had filed an appeal in its letter dated August 30, 2007 (Docket Entry No. 54), and defendant clarified he had not filed an appeal in his letter dated September 14, 2007 (Docket Entry No. 55).

[2]In Superior Court Criminal Rule 61(m), it is provided in pertinent part:

> *Definition.* A judgment of conviction is final for the purpose of this rule as follows:
> (1) If the defendant does not file a direct appeal, 30 days after the Superior

Defendant filed this motion for postconviction relief on August 27, 2007. In his motion, he sets forth numerous grounds for relief. I will address the various claims after first reviewing whether any procedural bars preclude consideration of any of them.[3]

None of the claims are untimely since defendant's motion was filed a day after the judgment of conviction became final. Super. Ct. Crim. R. 61(i)(1).

The only claims which are not procedurally barred are those asserting that trial counsel was ineffective.

In assessing if trial counsel has been effective, this Court employs the two-part standard

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Court imposes sentence....

[3]In Rule 61(i), it is provided as follows:

> *Bars to relief.* (1) Time limitation. A motion for postconviction relief may not be filed more than one year after the judgment of conviction is final or, if it asserts a retroactively applicable right that is newly recognized after the judgment of conviction is final, more than one year after the right is first recognized by the Supreme Court of Delaware or by the United States Supreme Court.
> (2) Repetitive motion. Any ground for relief that was not asserted in a prior postconviction proceeding, as required by subdivision (b)(2) of this rule, is thereafter barred, unless consideration of the claim in warranted in the interest of justice.
> (3) Procedural default. Any ground for relief that was not asserted in the proceedings leading to the judgment of conviction, as required by the rules of this court, is thereafter barred, unless the movant shows
> (A) Cause for relief from the procedural default and
> (B) Prejudice from violation of the movant's rights.
> (4) Former adjudication. Any ground for relief that was formerly adjudicated, whether in the proceedings leading to the judgment of conviction, in an appeal, in a postconviction proceeding, or in a federal habeas corpus proceeding, is thereafter barred, unless reconsideration of the claim is warranted in the interest of justice.
> (5) Bars inapplicable. The bars to relief in paragraphs (1), (2), and (3) of this subdivision shall not apply to a claim that the court lacked jurisdiction or to a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction.

set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Delaware's Supreme Court has explained what this standard requires in *Shelton v. State*, 744 A.2d 465, 475 (Del. 2000), *cert. den.,* 530 U.S. 1218 (2000):

> [Defendant] must ... prove that: (1) "counsel's representation fell below an objective standard of reasonableness," and (2) that counsel's actions were prejudicial to his defense, *i.e.,* "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." The prejudice prong of the *Strickland* standard requires "attention to whether the result of the proceeding was fundamentally unfair or unreliable." There is a strong presumption that defense counsel's conduct constituted sound trial strategy. Further, a defendant "must make specific allegations of actual prejudice and substantiate them." [Footnotes and citations omitted.]

Accord Jefferson v. State, 2009 WL 2523331, at *1 (Del. Feb. 4, 2009); *Anker v. State*, 941 A.2d 1018, 2008 WL 187962 (Del. Jan. 9, 2008) (TABLE). Should the defendant fail to make concrete allegations of ineffective assistance of counsel and fail to substantiate them, then the claim will be summarily dismissed. *Younger v. State,* 580 A.2d 552, 556 (Del. 1990); *Pierce v. State*, 2009 WL 189150, * 1 (Del. Jan. 16, 2009).

Defendant's general argument regarding ineffective assistance of counsel is set forth as follows:

> 1) On June 20, 2007 date of final case review defendants [sic] attorney ask [sic] to withdraw from his case in the Superior Court in Sussex County Georgetown, DE and the Judge allowed his decision. 2) Defendants [sic] attorney failed to object and show evidence in the defense for the defendant during trial June 26, 27, 2007. All search and seizure warrants should have been inadmissible evidence in court. Because states Prosecution did not produce or prove any evidence of the alleged activities in the Probable cause statement for my arrest.

Defendant argues that trial counsel sought to withdraw and he was in conflict with defendant before the trial began. The record shows that defendant voiced objections to trial counsel on June 20, 2007, and June 26, 2007, arguing he was ineffective. The Court ruled trial

counsel had been effective. As of June 26, 2007, defendant agreed to trial counsel representing him and he did not voice any further objections to that representation. Trial commenced on June 26, 2007. Defendant argues he was forced to accept trial counsel as his attorney to avoid representing himself. Whether defendant was happy with trial counsel representing him is not the issue; instead, the issues are whether trial counsel's representation fell below an objective standard of reasonableness **and,** if so, whether defendant suffered prejudice. *Strickland v. Washington, supra*. Thus, to the extent defendant argues he was not happy with trial counsel and was not happy about the situation, that argument fails to state any claim for entitlement to relief.

Defendant argues that trial counsel talked to him only once before his trial and trial counsel was not prepared for trial. He does not attempt to address the prejudice aspect. These allegations are conclusory and conclusory allegations fail. *Younger v. State*, *supra*; *Pierce v. State, supra.* Thus, this claim fails.

Defendant states he was not in street clothes for the trial; instead, he was in his prison uniform. Defendant was not compelled to appear in prison attire; thus, no constitutional violation took place. *Poteat v. State*, 2007 WL 2309983, * 2, 931 A.2d 437(Del. 2007) (TABLE). To the extent he argues trial counsel was ineffective for failing to arrange for him to dress in non-prison attire, he fails to show how the outcome would have been different if counsel had arranged for him to wear non-prison attire. *State v. Keperling*, 2000 WL 305493, *7 (Del. Super. Jan. 27, 2000). Thus, this claim fails.

Defendant argues that trial counsel was ineffective for failing to object or seek a mistrial due to a juror problem.

The record shows the following. One of the jurors made up her mind that the defendant

was guilty before jury deliberations. She voiced her opinion to an alternate juror. The Court excused the juror and the alternate juror. The Court then interviewed each of the remaining jurors and alternates to see if any of them were tainted. As a part of this process, trial counsel demanded certain questions be asked to insure that none of the other jurors were tainted. Contrary to defendant's contentions, trial counsel did ask for a mistrial. Transcript of June 27, 2007, Trial Proceedings at B-87; B-128. The Court ruled: "For the record, I am making a finding that following the voir dire and questioning that there is a fair jury in place and none of the jurors are tainted at all by anything from [Juror No. 3.] So the motion is denied. So we will just sit Alternate 1 for [Juror No. 3] and proceed." *Id.* at B-128-9.

Defendant's assertion that trial counsel was ineffective with regard to the juror problem is based on a factual error. Thus, the claim fails.

Defendant's next claim of ineffective assistance of counsel is based upon his contentions that the State did not prove its case. He makes the same arguments that trial counsel made at trial and he attacks the same evidence which trial counsel attacked. He further argues that trial counsel did not put on a defense. These arguments fail because they are conclusory. In any case, contrary to defendant's contentions, trial counsel did provide a defense. Trial counsel attacked the same evidence which defendant has attacked in his motion and trial counsel did argue that the State had failed to meet its burden of proof. Defendant is not happy with the fact that the State could establish its case with circumstantial evidence. That does not mean his trial counsel was ineffective. These arguments of ineffectiveness fail.

Defendant also makes an argument regarding the search warrants which, frankly, is unclear. He seems to be arguing that because the State did not present evidence which supported

the application for a search warrant, then the State was precluded from proceeding on the charges on which he was arrested. To the extent defendant argues something other than that, the argument fails for lack of clarity. To the extent defendant makes that argument, his argument fails. There is no requirement that the State establish, in its case in chief, the facts which supported the search warrant. The probable cause determination for each element of the crime on which defendant was arrested was made by the Grand Jury when it indicted him on November 13, 2006. This claim fails.

The remainder of defendant's claims are procedurally barred because defendant failed to raise them at trial or on appeal. Super. Ct. Crim. R. 61(i)(3).

Defendant argues that the State failed to prove its case beyond a reasonable doubt. He attacks virtually every element of the State's case and presents his factual contentions. He argues that there were inconsistencies in the testimony of the State's witnesses. He argues other evidence could be impeaching of the testimony of the State's witnesses. He attacks the credibility of various witnesses' testimony and the documentary evidence, such as the lab report and the police report. He argues all the evidence was inadmissible because the State failed to prove the facts set forth in the probable cause statement for the warrant. Although there were stipulations regarding defendant's address, defendant attacks the validity of the search warrant and affidavit of probable case on the ground that they stated the address where the search and arrest took place was 11845 Hickman Lane rather than 11845 Hickman Drive. He further argues there were time discrepancies regarding executions and returns in the paperwork.

These are arguments which defendant should have raised at trial or on appeal. He did not raise them at trial or take an appeal. "Rule 61(i)(3) provides that any claims that were not

asserted in the proceedings leading to the judgment of conviction are thereafter barred unless the petitioner can establish cause and prejudice to excuse the procedural default. [Footnote omitted.]" *Fahmy v. Sate*, 2009 WL 189838, * 2 (Del. Jan. 20, 2009). Defendant has not made any attempt whatsoever to overcome the procedural bars. This Court does not discern any cause for why defendant did not pursue the claims at trial or on direct appeal except to the extent defendant advances these arguments within the context of his ineffective assistance of counsel claims. The Court previously considered those issues within the context of the ineffective assistance of counsel claims and found defendant not to have made his case. Thus, all of these claims are procedurally barred. Super. Ct. Crim. R. 61(i)(3).

For the foregoing reasons, defendant's motion for postconviction relief is DENIED.

IT IS SO ORDERED.

Very truly yours,

Richard F. Stokes

cc: Prothonotary's Office
John W. Donahue, IV, Esquire
William M. Chasanov, Esquire